



UNIVERSITY OF TORONTO
FACULTY OF LAW

LEGAL METHODS

INTENSIVE COURSE

August 20 – August 30, 2018

Dean Edward Iacobucci
Professor Yasmin Dawood
Professor Anthony Niblett

KE
442
.I23
2018
c.1

BORA LASKIN LAW LIBRARY

SEP - 7 2018

FACULTY OF LAW
UNIVERSITY OF TORONTO



UNIVERSITY OF TORONTO
FACULTY OF LAW

LEGAL METHODS

INTENSIVE COURSE

August 20 – August 30, 2018

Dean Edward Iacobucci
Professor Yasmin Dawood
Professor Anthony Niblett

Legal Methods Intensive Course
University of Toronto, Faculty of Law
August 20 – August 30, 2018

SECTION A

EDWARD IACOBUCCI

deansoffice.law@utoronto.ca

(416) 978-3718

Office: Jackman J406

SECTION B

ANTHONY NIBLETT

another.niblett@utoronto.ca

(416) 978-5403

Office: Jackman J366

SECTION C

YASMIN DAWOOD

yasmin.dawood@utoronto.ca

(416) 946-7829

Office: Jackman J468

Evaluation:

- This course is evaluated on a credit/no credit basis
- To receive credit for this course, students must attend class and complete:
 - One take-home briefing exercise
 - One in-class legal analysis exercise

Course description

One of the central goals of our JD program is to train students to “think like lawyers.” The Legal Methods intensive course is designed to introduce students to the foundational information and reasoning needed to make the most of the JD program from the outset.

The course will provide general background information on the foundations of the Canadian legal system, such as the important legal institutions, the distinction between private and public law, the sources of law, and the relationship between core first-year courses.

The course will emphasize legal analytical methods and techniques used by law students. The course provides an introduction to analyzing and briefing cases, teaching students to identify key elements of a case and how to use precedents. The course also introduces students to statutory interpretation, the interaction between courts and the legislature, and an introduction on how to prepare for and write law school exams.

Schedule of classes

Week 1

Monday, August 20

Tuesday, August 21

Wednesday, August 22

Thursday, August 23

Introduction to Law School (Afternoon Only)

Reading and Briefing Cases

Precedents: How to Use and Work with Cases

Legal Arguments and Reasoning by Analogy

Week 2

Monday, August 27

Tuesday, August 28

Wednesday, August 29

Thursday, August 30

Plenary on Aboriginal Law

Statutory Interpretation

Introduction to the Constitution

Course Review & In-Class Writing Exercise

REQUIRED READINGS

WEEK 1

Monday, August 20, 2018

PM: Introduction to Law School

- | | Casebook Pages |
|--|-----------------------|
| • What is Law? | 5-12 |
| • <i>Morland-Jones v Taerk</i> , 2014 ONSC 3061 | 13-16 |
| • <i>Mustapha v Culligan of Canada Ltd.</i> , [2008] 2 SCR 114 | 17-21 |

Tuesday, August 21, 2018

AM: Reading and Briefing Cases

- | | Casebook Pages |
|--|-----------------------|
| • Structure of the Courts, Legal Reasoning, Common Law | 22-28 |
| • <i>Wicks Estate v Harnett</i> , [2007] OJ No 2120 | 29-35 |

PM: Reading and Briefing Cases (continued)

- | | Casebook Pages |
|--|-----------------------|
| • <i>Crookes v Newton</i> , [2011] 3 SCR 269 | 36-44 |

Wednesday, August 22, 2018

AM: Precedent and Using Cases

- | | Casebook Pages |
|---|-----------------------|
| • <i>Menow v Jordan House Ltd.</i> , [1974] SCR 239 | 45-49 |
| • <i>Crocker v Sundance Northwest Resorts</i> , [1988] 1 SCR 1186 | 50-58 |

PM: Precedent and Using Cases (continued)

- | | Casebook Pages |
|---|-----------------------|
| • <i>Stewart v Pettie</i> , [1995] 1 SCR 131 | 59-68 |
| • <i>Childs v Desormeaux</i> , [2006] 1 SCR 643 | 69-77 |

Thursday, August 23, 2018

Briefing assignment due today, first thing in class.

AM: Legal Arguments and Reasoning by Analogy

- | | Casebook Pages |
|--|-----------------------|
| • <i>Phillips v Brooks, Ltd.</i> , [1919] 2 KB 243 | 78-80 |
| • <i>Ingram v Little</i> , [1961] 1 QB 31 | 81-87 |
| • <i>Lewis v Averay</i> , [1972] 1 QB 198 | 88-91 |

PM: Introduction to Statutory Interpretation

- | | Casebook Pages |
|----------------------------|-----------------------|
| • Statutory Interpretation | 92-95 |

WEEK 2

Monday, August 27, 2018

AM: Aboriginal Law

No Readings

PM: Aboriginal Law (continued)

Casebook Pages

- *R v Marshall, R v Bernard*, 2005 SCC 43 96-107
- *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 108-116

Tuesday, August 28, 2018

AM: Statutory Interpretation

Casebook Pages

- *R v Goulis* (1981), 33 OR (2d) 55 117-122
- *R v Scott*, [2000] BCJ No 800 123-137

PM: Statutory Interpretation (continued)

Casebook Pages

- *Reference Re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 138-157

Wednesday, August 29, 2018

AM: Introduction to the Constitution

Casebook Pages

- Introduction to the Constitution 158-166
- The Constitution Act, 1867 (excerpts) 167-170
- The Constitution Act, 1982 (excerpts) 171-179
- *R v Keegstra*, [1990] 3 SCR 697 180-211

PM: Introduction to the Constitution (cont'd) and Hypotheticals No Readings

Thursday, August 30, 2018

AM: Course Review & Tips for Law School

Casebook Pages

- John Dernbach, *Writing Essay Exams to Succeed in Law School (Not Just to Survive)*, 4th ed (Aspen, 2014) 212-225
Ch 4 "From Process to Writing" & Ch 5 "Explaining Your Answer"
- Optional readings about succeeding at law school available in the library:
 - Allan C. Hutchinson, *The Law School Book: Succeeding at Law School* (Irwin Law, 2009)
 - Austen L. Parrish & Cristina C. Knolton, *Hard-Nosed Advice from a Cranky Law Professor: How to Succeed in Law School* (Carolina Academic Press, 2010)

- Richard M. Fischl & Jeremy Paul, *Getting to Maybe: How to Excel on Law School Exams* (Carolina Academic Press, 1999)

Thursday, August 30, 2018 (continued)

PM: In-class Writing Exercise

Casebook Pages

- Read background materials for Assignment 2 in advance 244-248

ADDITIONAL READING

Casebook Pages

- Glossary 226-228

ASSIGNMENTS

Casebook Pages

- Assignment 1 – Case brief *Mattel, Inc v 3894207 Canada Inc* 229-243
- Assignment 2 – In-class writing exercise problem 244-248

READING FOR DAY ONE: MONDAY, AUGUST 20, 2018

What is Law?

There are many different conceptions of law. What any particular author means when referring to the “law” depends heavily on the context in which they are referencing the word. A universal definition of law that everyone can agree on is not possible. A few general (overly simplified) working definitions of “law”, however, might prove useful to begin thinking about law and legal methods.

A consistent feature of human society has been conflict. Individuals often have incompatible individual interests. On occasion, individuals with different interests enter into conflict with one another. On other occasions, an individual might have interests that conflict with the interests of the community as a whole. The interests of one community might also conflict with the interests of another community. These conflicting interests at times give rise to disputes. Society requires a system for resolving these disputes. Law can be conceived as a manifestation of the common values of a society and its various systems for resolving conflicts that arise.

If law is a collection of a society’s systems for resolving conflicts, one might be inclined to think the law is simply a set of rules. Indeed, one theory of law (called the “positivist” theory) would characterize law as rules created by authorized agents (i.e. society’s leaders), which can be enforced by the state. But law is much more than a large collection of rules. Societies evolve, interests change, and new types of conflict arise. It is not feasible for a society to simply write down all of its rules at its inception and do nothing but refer to those rules as disputes arise. For any given dispute, a rule could be ambiguous or vague, could conflict with another rule, or produce some absurd or unjust result that would never have been intended by the rule’s author.

Where do Laws Come From?

Components of the Legal System

A legal system is made up of a variety of actors and institutions which perform three central functions: 1) making the law, 2) interpreting the law and applying it to individual cases, and 3) enforcing the law. In a modern democratic state like Canada, there are three branches of government which more or less map on to one of these three functions. Making the law is the function to the *legislative* branch (legislatures, federal and provincial), interpreting and applying the law is the domain of the *judicial* branch (courts), and enforcing the law is left to the *executive* branch (the Prime Minister, cabinet, and various government ministries).

One theoretically pure conception of government might seek to maintain a 1:1 relationship between each branch of government and its assigned function. So, for example, the legislature would be entirely and exclusively responsible for making law (in the form of statutes), and the executive branch would have no role in deciding the outcome of a legal dispute, etc. This is a principle known as the *separation of powers*, which is important for the functioning of a democratic government. The separation of powers ensures, among other things, that judges can perform their roles independently and without influence, and that the executive branch cannot impose laws arbitrarily and without the consent of the country’s elected representatives.

Common Law

Things are, of course, not so simple. “Law” is made not only by legislative action (through statutes) but also by courts. Courts make law through what is known as the “common law”. Throughout history and into the present day, legal disputes have raised issues that, for one reason or another, the legislature had neglected to deal with through formal legislative law. As these issues arise, judges develop common law rules and principles on a case-by-case basis. Instead of consisting of a written “rule” from the legislature, these judge-made rules are instead gleaned from prior judicial decisions and are applied, adjusted and/or dismissed when similar disputes arise again. Over time, the legislature has produced more and more statutes dealing with what was traditionally common law territory. In the process, legislation has supplanted any judge-made law to the extent that it is inconsistent with the pre-existing common law.

Administrative Law

The modern state has many important regulatory functions (the environment, labour relations, human rights, immigration, etc.). Given the range and extent of activities of the modern state, laws concerning these subjects have to be lengthy, detailed, and frequently revised to adapt to changing economic, social, scientific and political circumstances. Legislatures simply do not have time for this detailed work, and to require them to pass a law for each and every one of the thousands of rules regulating the administrative state would be cumbersome and inflexible. Instead, the legislature passes legislation which delegates power to another institution or agency (usually a government ministry under the executive branch) who can then work out the details. These details (or regulations) are another important source of law in Canadian society.

Public vs. Private Law

One way to think about the law is as a system for resolving the various different types of disputes that can arise in a society. Areas of law can be divided – albeit not perfectly – into different types of conflict. One broad distinction is that of public law versus private law. *Public law* involves the government and deals with conflicts that arise between an individual and the state (*e.g.*, taxation, criminal law, constitutional law), or sometimes between two competing forms of government (federal-provincial disputes under the *Constitution Act, 1982*). Administrative law is one area of public law that deals with disputes between the individual and the regulatory state. *Private law* involves disputes between individuals or groups of individuals (including corporations) without involving the state (contracts, torts, and property).

Different Legal Systems

Common law

Ontario is a common law jurisdiction. A common law jurisdiction is best understood as a legal system where a great deal of importance is placed on the past decisions of judges. The principle underlying this system is the idea that it would be arbitrary and unfair to treat cases with similar facts differently. Therefore, past cases form a body of precedents that judges are expected to consider and, if appropriate, follow when resolving a legal dispute before them. If a judge determines that the facts of a particular case are sufficiently distinct from the body of prior cases,

then that judge has the authority to depart from the precedent and decide the matter anew, forming a new line of precedent going forward.

The importance of past judicial decisions in our common law system applies to both traditional common law matters and matters that involve legislation. Put another way, legislative law still exists within a common law system. How a judge interprets a statute in the first instance can impact how that statute is interpreted in the future. While the legislature is formally responsible for making the statutory law, it is the responsibility of the judiciary to interpret that legislation when disputes arise. As interpreters, judges can have a lot of power in fleshing out the content of a statutory rule, and thus in deciding how that law will operate in society.

The origins of the common law date back to medieval England. In part because of its relative isolation from the rest of Europe, English law developed quite differently from the civil law tradition of Europe. Faced with disputes between litigants, English judges searched for fair, just, and reasonable solutions, which they developed as they went along, relying on their own sense of justice. Since justice requires like cases to be treated alike, the judges sought consistency and uniformity by following previous decisions. A body of law was built up and enforced by way of incremental judicial learning and refinement.

Today, approximately one third of the world's population lives in common law jurisdictions. The greatest number reside in countries that trace their legal heritage to England as former colonies of the British Empire, including the United States, Australia, India, and most of Canada.

Civil law

Common law jurisdictions can be contrasted with civil law jurisdictions, in which the primary and ultimate source of law is a codified set of core principles. This system of law places far less importance on the decisions of courts. Instead, a civil law "Code" contains all the law there is. In theory, judicial decisions do not make law; they are simply applications of the unchanging provisions of the Code, which have a binding effect on any judge later in time. The orienting principle underlying this system is that citizens and officials ought to be provided with all the laws that apply to them in advance and that the uncertainty and potential arbitrariness of "after the fact" judge-made law ought to be avoided.

Civil law takes a logical approach to legal issues. Faced with a legal problem, civil law practitioners turn to the code of the jurisdiction, select the appropriate principle, and from it deduce the solution. Strong on rationality and theory, civilian lawyers prefer to think through the problem in terms of rights, duties and first principles. By contrast, the hallmark of common law lawyers is practicality. To solve a legal problem, they turn to history, common law principle and judicial precedent, and from these find, by analogy, an appropriate rule (or set of rules). Given the significant differences in orienting philosophies, it is perhaps surprising how closely related the legal rules turn out to be in common law and civil law jurisdictions. Regardless of a legal system's starting point, it appears that various social, economic, and political pressures result in a largely similar set of legal rules.

The civil system of law dates back to the codified law of the Roman Empire and in particular the Code of Justinian from the 6th century. Today it is also largely influenced by the Napoleonic Code that was established under Napoleon in the early 19th century. The modern European legal systems have their roots in these codes, which were brought by European settlers to South America, Mexico,

Louisiana, and to other areas of French and Spanish colonization. European legal systems were also exported to countries such as Turkey and Japan, which modelled their own laws on codes of continental Europe. Quebec, influenced by its French heritage, still uses civil law for most of its private law matters.

International Law

International law deals with the relations among states, often facilitated with the assistance of international organizations. International law consists of sets of rules, often set out in treaties, which countries follow in dealing with each other. International law consists of (a) public international law (the relationship between sovereign states and international entities such as the International Criminal Court of the United Nations); (b) private international law (addressing questions of territory and potentially conflicting jurisdiction); and (c) supranational law (the set of collective laws that sovereign states voluntarily yield to, such as the United Nations Security Council).

For the most part, international law does not apply to a nation unless the nation specifically consents to its application. Treaties are the strongest and most authoritative sources of international law because they represent a consensual agreement between the countries that sign them. Treaties can be either bilateral (between two countries) or multilateral (between many countries). Treaties can have their own rules for enforcement, such as arbitration, or refer enforcement concerns to another agency, such as the International Court of Justice. Other sources of international law include customary international law, general principles of law, and even judicial decisions from international legal organizations such as the International Court of Justice.

Historically, international law only addressed relations between states in certain limited areas (such as war and diplomacy) and was dependent on the sovereignty and territorial boundaries of distinct countries. As globalization has accelerated, international law has become a vehicle for states to cooperate regarding new areas of international relations (such as the environment and human rights). Much of this activity is at the vanguard of international law and requires a rethinking of the previous notions of the inviolable sovereign state.

Aboriginal Law

As we have seen, the law in Canada is far from being a homegrown product. Like many institutions, it is almost entirely imported. The law in Canada draws heavily from the English common law and from the French civil law. While recognized in some early treaties, the laws and formal practices of Indigenous peoples in Canada were largely neglected by British North American and Canadian courts and governments until relatively recently. Indigenous peoples were regulated by an array of rules that they had little or no hand in shaping.

Canadian courts have recently begun to recognize with greater sincerity some of the legal principles and traditions of Indigenous peoples, particularly with regard to conceptions of property and title, making them a rich area of legal study. Traditional Indigenous conceptions of the environment, economic activity, ownership, and community differ radically from the European approaches that have dominated for over two centuries. Some Indigenous laws and customs have been remarkably resilient and have preserved within Indigenous communities, while many have been lost as a result of long-term suppression.

A Note on Terminology: Aboriginal Law and Indigenous Law

There are over 600 Indigenous communities in Canada, each with distinct histories and cultures. Therefore, the use of a categorical “umbrella term” is inherently problematic and not everyone will agree on what to use since language and culture are continually evolving.

Terminology is important because the words used to refer to Indigenous peoples are interrelated with histories of colonization. There may be tension between legal terms and preferred cultural practices. Although terms like “Indian” and “Aboriginal” have been built into Canadian statutes, (e.g. The Indian Act, The Constitution Act 1982), these words continue to carry pejorative connotations. Statutes, constitutions, and treaties are products of particular historical moments and these documents carry the legacies of oppression and colonization.

Section 35(2) of Constitution Act 1982, uses the terms “Aboriginal” and “Indian”: (“*In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.*”). The entrenchment of these terms in the Constitution means that this language will continue to be used in Canadian legal doctrine – for instance, when referring to *Aboriginal title, treaty, and rights*, or *Indian status*. However, there has been some resistance against these terms as indicators of identity. First, instead of “Indian,” which traces back to a mistake by Christopher Columbus, “First Nations” is a term used to identify Indigenous peoples of Canada who are neither Métis nor Inuit. Secondly, some groups prefer Indigenous peoples to Aboriginal peoples, to include First Nations, Inuit, and Métis peoples.

Both the Federal government and government of Ontario have started using the language of Indigenous to refer to their Ministries (Ontario Ministry of Indigenous Relations and Reconciliation and the Federal Ministry of Indigenous and Northern Affairs). This acknowledges international norms, such as the United Nations Declaration on the Rights of Indigenous Peoples.

However, some individuals and communities may continue to use terms like “Native” or “Indian.” It is important to note how individuals and groups prefer to identify themselves rather than imposing a categorical label that applies in all situations. Therefore, when describing a particular community or individual, it is best to be contextual and specific. While using “Indigenous” as a broad term may be appropriate in some circumstances, it may not be when more information is available. For example, if an individual is Métis, it would be preferable to use that term. If possible, ask individuals and communities how they identify and what they would like to be called.

That being said, there are some common conventions. When referring to Indigenous groups, possessive constructions should be avoided (e.g. Canada’s First Nations or the Indigenous peoples of Canada), as they imply ownership. “Indigenous Peoples in Canada” would be preferred. Some groups, like the Mohawk or Haudenosaunee, may not identify as “Canadian” citizens at all. Capitalization is also preferred since they are proper names of nations of people, just as French or English are capitalized.

For the purposes of this casebook, we will use the term “Indigenous” when referring to populations including First Nations, Métis, and Inuit. We will use the terms “Aboriginal rights”, “Aboriginal treaty”, and “Aboriginal title” when referring to the legal doctrines adopted by the government of Canada. “Indian status” refers to those who are registered under the Indian Act.

We are grateful to Amanda Carling from the Indigenous Initiatives Office and Professor Sanderson for their helpful insights in developing our thinking on this complex issue. We acknowledge that

not everyone will agree on the terms we have selected and that there may be changes in the future. Differences in opinion are reflective of the constantly evolving nature of this discussion.

Suggested Readings

Bob Joseph. "Indigenous or Aboriginal: Which is correct?", CBC News, online: <<http://www.cbc.ca/news/indigenous/indigenous-aboriginal-which-is-correct-1.3771433>>.

Key Definitions

Branches of Government: There are three branches of government: the Executive, comprising essentially the Cabinet and the Ministries; the Legislative, being Parliament in the federal sphere and the legislatures in the provincial sphere; and the judicial branch.

Civil law: The system of law predominant on the European continent and of which a form is in force in Quebec, historically influenced by the codes of ancient Rome.

Common Law: The law as stated in the decisions of the judges from the earliest times to the present.

Executive branch: The branch of government, consisting of the queen (as represented by the Governor General), the Cabinet, and the ministries of the government, vested with the responsibility of administering and enforcing laws.

International law: A body of rules established by custom or treaty and recognized by nations as binding in their relations with one another.

Judicial branch: The branch of government, consisting of the system of courts and all judges, vested with the responsibility to interpret, construe, and apply the law.

Judicial Opinions/Judgments/Decisions: The (usually) written reasons given by judges for their conclusions as to a dispute at issue.

Legal Positivism: A school of legal theory whose advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies.

Legislation: One or more statutes or Acts enacted by Parliament or a legislature.

Legislature: The provincial equivalent of the federal Parliament but with only one House, usually called the Legislative Assembly.

Ministry: A branch or department of a government, such as the Ministry of Citizenship and Immigration, Refugees and Citizenship (federal), or the Ministry of Natural Resources and Forestry or Education (provincial).

Parliament: The House of Commons and the Senate of Canada.

Separation of powers: The partition of legal powers between branches of government, most often categorized as the legislature, the executive, and the judiciary.

Statute: A law or act enacted by a Parliament or Legislature.

Suggested Further Reading

Patrick Fitzgerald and Barry Wright, *Looking at Law: Canada's Legal System* (Toronto and Vancouver, Butterworths, 2000)

- Ch 1, “What is Law” pp. 1-6: Provides a conceptual picture of legal theory. Introduces competing conceptions of law not discussed in the above passage (including a challenge to legal positivism known as natural law). Discusses interdisciplinary approaches to law that focus on how societal realities, separate from strictly legal argumentation, play a large role in defining law.

Stephen Waddams, *Introduction to the Study of Law: 8th ed.* (Toronto, Thomson Carswell, 2016).

- Ch 1, “What is Law” pp 1-17: Another perspective on the idea of law. Introduces the concepts of justice and the rule of law and discusses the role of judges in defining law.

READING FOR DAY 2: TUESDAY, AUGUST 21, 2018

Structure of the Courts

Hierarchy of the Courts: Trials vs Appeals

Judges and courts exist in a strict hierarchy. While a full understanding of the complexities of the court system cannot be exhaustively set out in this brief excerpt, a general framework of how things work will prove useful. When a dispute arises before any two parties and they decide they need the legal system to sort things out, the first court they attend will usually conduct a “trial.” The court at which a trial is held is often referred to as “the court of first instance.” In a trial, both parties present their arguments before a judge. The trial judge considers evidence, makes factual findings and legal decisions, applies the law to the facts, and finally renders a decision.

If either party is unhappy with the decision of the trial court, they may attempt to appeal the decision. Appellate courts review the decision of the lower court and either affirm the trial judge’s decision or, if they feel the lower court got it wrong, substitute their own decision. With respect to determinations from the trial judge relating to questions of fact (*i.e.*, the trial judge’s determination of what events actually occurred, which often turns on the trial judge’s appreciation of all of the evidence before the trial court) the appellate court will strongly defer to the trial court. An appellate court will only reverse a factual finding if there was clearly an error made. There is typically little or no deference to lower courts with respect to how the lower courts resolved questions of law. With respect to questions of law (*e.g.*, whether a particular statute was interpreted correctly), if an appellate court disagrees with the opinion of the lower court, the appellate court will usually reverse the lower court and substitute its own conclusion.

If one of the parties is unhappy with the outcome following the first appeal, they may attempt to appeal again to a higher court. Usually, at this point, appeals are not given out liberally and will only be taken if an important legal question or issue needs to be resolved. The Supreme Court of Canada is the highest appeal court in Canada. With a few exceptions, the Supreme Court of Canada is not required to hear appeals from lower court decisions and instead will select cases that the Court feels merit its time and attention. If the Supreme Court of Canada agrees to hear an appeal from a lower court, the Supreme Court’s decision on how a legal dispute should be resolved is the final resolution.

The Supreme Court serves another important function. In addition to legal issues arising out of a dispute, the federal government (technically the Governor in Council) can simply refer a legal question to the Supreme Court for its opinion on certain legal issues (which by default would be the binding legal opinion in Canada). These are called References and they are often extremely important for the Government and Canada as a whole. Recent references include the *Reference re Senate Reform* and the *Reference re Supreme Court Act, ss. 5 and 6*. In answering the legal question referred to the Court, it was decided that the Hon. Justice Marc Nadon of the Federal Court of Appeal was not eligible for direct appointment to serve on the Supreme Court of Canada as an appointee from the Province of Quebec. The provincial governments have the power to refer questions to their provincial appellate courts.

Legal Reasoning and Common Law

What do previous decisions mean for other courts?

In common law jurisdictions, a decision in a particular dispute will mean something to the legal community as a whole and not just to the parties directly involved in the case. Since the rules and principles of the common law are gleaned from judicial decisions, judges are invited to consider the wider implications of their decision as they resolve the dispute in front of them. Moreover, when deciding the case at hand, judges are constrained by the rules and principles laid down in previous decisions dealing with similar issues.

In our legal system, previous judicial decisions play a significant role in determining the outcome of a legal dispute. This is true not just in traditionally common law areas such as contracts, torts, and property, but also in disputes which rely for their resolution heavily on legislatively created statutory law. For instance, an opinion which interprets a statute in a certain way (say, a provision of the *Income Tax Act*) will tend to influence a later court when interpreting the same provision.

Stare Decisis: Lower Courts and Later Courts

The principle of reliance on decided cases is called, in Latin, *stare decisis* (“to stand by what has been decided”). The principle provides a measure of stability, predictability, and continuity in our legal system so that similar disputes arising later in time can be resolved quickly and without the need for another costly legal battle. Decided cases form a body of precedent which gives the common law its content and guides the decision making of parties to disputes, where parties are unable to resolve their disputes outside of court.

In terms of later influence, not all judicial opinions are equally important. The higher the court in the hierarchy, the more powerful is the influence of a given judgment. Generally, where no relevant distinction can be discerned between a particular dispute and a dispute resolved earlier, an unambiguous decision of the higher court is strictly binding on the lower court. That is, the precedent must be followed. Where there is a clearly binding precedent, disputes are more likely to be settled than to proceed to a trial. Decisions from the Supreme Court of Canada are binding on all of Canada’s lower courts. Provincial appellate court decisions are binding on lower courts within that province. Extra-provincial appellate court decisions will have high persuasive value but are not binding. Moreover, courts are not technically bound by their own prior decisions, although they tend to be persuasive authority. It takes an exceptional case for a court to reject its own earlier precedents.

Not everything that appears in a judgment is binding on later decision makers. The actual facts of the case will never arise again in exactly the same form and applying the reasoning of past decision to the dispute at issue will always require a certain level of abstraction. Usually, a decision states a general rule that explains the result in the instant case and will apply to at least some other cases. It is this rule, called the *ratio decidendi* (“reason for deciding”), that is technically binding on lower courts for purposes of precedent. Statements that are not crucial, or which refer to hypothetical facts or to unrelated legal issues are known as *obiter dicta* (“things said by the way”).

Ratio vs Obiter Dicta

In theory, while the *ratio* is binding on lower courts, *obiter* is not. Perhaps a simple example would be useful. Suppose a judge were to say, “Because the situation is A, I decide the outcome should be X; however, were the situation more akin to B, I should think that the outcome should be Y.” Technically, the *ratio decidendi* only includes the first part of the sentence (if A, then X). If a later case arose in which the situation was more akin to B, a lawyer whose client did not like outcome Y would argue that the judge’s comments with respect to B were merely *obiter dicta* and would not necessarily need to be followed.

What is Legal Reasoning?

In practice, it is impossible to isolate with certainty the precise *ratio decidendi* as distinguished from *obiter dicta*. Arguing about what exactly a previous court intended the rule to be is the stuff of legal reasoning and something you will become familiar with as the year goes on. You will soon see that lines of precedent and rules from prior cases can be construed narrowly or broadly (and everywhere in between) depending on which side you are arguing for. Since the facts of two cases are never exactly the same, one can always attempt to distinguish the rules of previous cases given the new facts of the case at issue. One can also draw analogies to other cases and other lines of precedent to argue that the current dispute should be decided similarly. This is, in some sense, the meat of what lawyers and judges actually do, and to read too much about it at an abstract level is likely not as helpful as reading the judgments themselves. The role of precedents, *ratio decidendi*, *obiter dicta*, and legal reasoning more generally will become clearer as you read more cases and see what judges actually do with these tools in order to reach a decision.

What about Dissents?

Most appeals are heard by more than one judge. Cases at the Supreme Court of Canada are usually heard by seven or nine justices (occasionally five hear an appeal, too). These individuals can have divergent viewpoints on certain legal issues, and they are by no means obliged to agree with one another when deciding appeals. A judge who disagrees with the decided outcome of the dispute can write what is called a dissenting opinion (or “dissent”). The dissenting judge might disagree with the majority of the court’s interpretation of the common law or statute, or they might disagree with the majority’s application of the statute/common law to the facts (or some combination of both).

You might wonder what relevance a dissent has in the common law. Dissents can be important and are worthy of careful study. Take for instance a contentious Supreme Court case where the judges split 5-4. The five-judge majority’s holding is what technically binds lower courts, but when four esteemed members of the highest court in the country disagree with the majority, lower courts (and law school students) should take notice. These dissents can be persuasive and may influence the development of the common law. Also, because no two cases are the same, distinctions can always be drawn in an attempt to argue that, in light of new facts or some change in societal circumstances, the previous dissenting view should prevail in this new case. This case might then be appealed and heard again by the Supreme Court where, in light of new facts (and in light of it being a contentious issue), the old dissent might evolve into the *ratio decidendi* of the majority. Yesterday’s dissent can become today’s law.

Concurrences

Judges might also agree with the outcome of the case but disagree with the reasoning behind it. These are called concurrences. For instance, five judges might conclude that “the appellant should win, because of X,” while four concurring judges might say, “We agree that the appellant should win the case, but because of Y, not X.” Similar to dissents, it is the majority view that binds, but the concurring view is still important and will influence the development of the common law.

Pluralities

In a case with multiple complex issues, you might encounter a large number of different viewpoints and opinions from multiple judges. A plurality opinion results when there are multiple concurrences and dissents such that there is no single majority opinion (e.g., four judges think X, three judges think Y, and two judges think Z). In this case, the 4-judge opinion technically holds as law, but a highly divided court will serve as a strong signal that the issue is not legally settled.

Key Definitions

Appeal: Examination by a higher court of a lower court or tribunal decision. The higher court may affirm, vary, or reverse the original decision.

Appellate Court: The court that hears appeals from judgments of the trial courts. There are provincial appellate courts to hear appeals from the provincial courts and the provincial superior courts and the Federal Court of Appeal to hear appeals from the Federal Court, Trial Division.

Courts/Judiciary: The institution in society that resolves disputes in accordance with the law. Such disputes can arise between citizens or between citizens and their government. Courts are also given the responsibility to ensure that the government has acted in accordance with the Constitution.

Dialogue: The relationship of give and take between courts and legislatures resulting from judicial decisions striking down laws and new legislation enacted in response.

Dissent: An explicit disagreement by one or more judges with the decision of the majority on a case before them.

Governor in Council: The Governor General acting on the advice of Cabinet.

Judicial independence: The constitutional rule that the judiciary is to be insulated from manipulation and the perception of manipulation from the other branches of government.

Obiter Dicta: Statements made by a judge in the course of giving reasons for a decision in a particular case that are not necessary elements of the reasons for decision. That is, the judge could have reached the decision without making the statements. Under the common law, obiter dicta are not binding on courts in subsequent cases.

Precedent: A court decision (or body of decisions) that is cited as an example or analogy to resolve similar questions of law in later cases.

Ratio Decidendi: The legal principle upon which the decision in a specific case is founded. Also known as the holding of a decision.

Reference: A process by which the government refers a legal or constitutional question, such as the validity of legislation, to a court for the purpose of obtaining a decision of the court on the question referred.

Stare Decisis: The principle by which decisions of a higher court are binding on and must be followed by lower courts.

Trial: A judicial examination and determination of facts and legal issues arising between parties to a civil or criminal action.

Trier of Fact: The person or people in court who assess the facts of the case, namely, the jury, when it exists, or the judge.

Suggested Further Reading

Department of Justice Canada, “Canada’s Court System: ‘How the Courts are Organized’”
<http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html>

- A detailed introduction of the structure of the court system in Canada, and what issues are heard in which court. Also discusses the subject-specific courts like the Tax Court, Unified Family Court, etc.

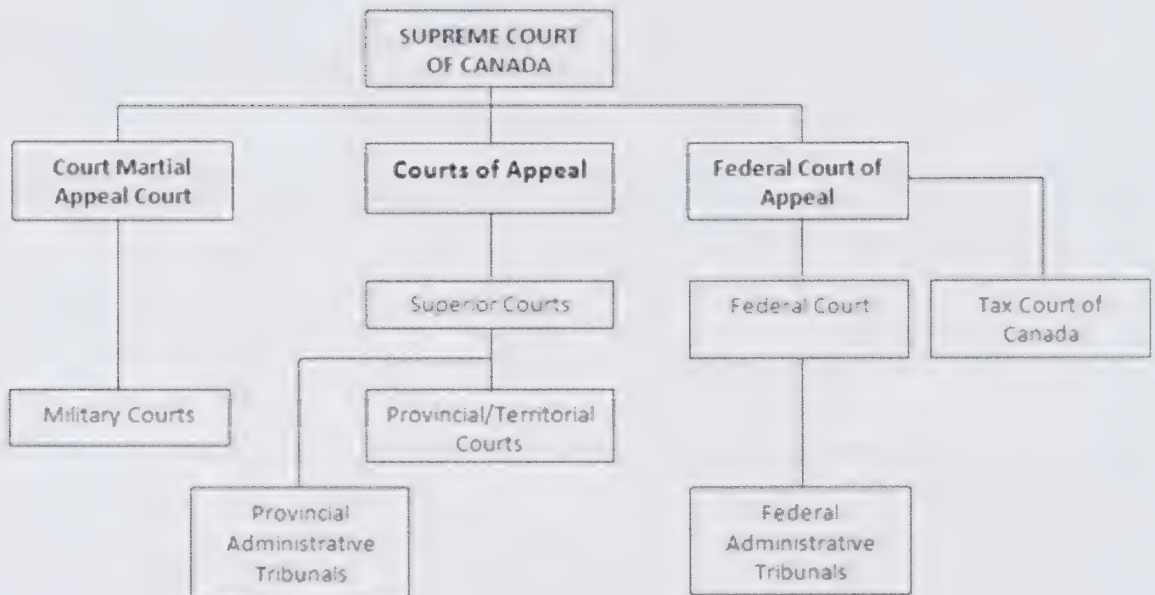
Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Harvard University Press, 2009)

- Ch 3 pp 36-60 “The Practice and Problems of Precedent”: a theoretical (and more detailed) introduction to the idea of precedent and legal reasoning in general.
- Chs 4-6 are also instructive.

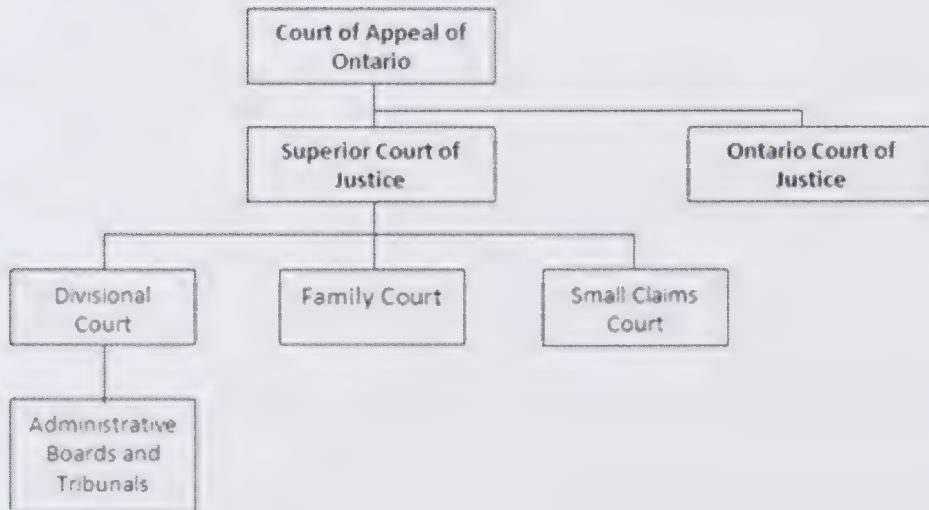
Stephen Waddams, *Introduction to the Study of Law: 8th ed.* (Toronto, Thomson Carswell, 2016).

- Ch 7 pp. 71-86 “The Common Law”: discusses common law, judicial reasoning, the use of prior decisions, and the principle of *stare decisis*.
- Ch 10 pp. 103-110, “The Structure of the Courts”: A similarly detailed examination of the structure of the courts in Canada. Introduces the distinctions between Provincial superior courts and Courts of Justice, Federal Courts, and various appeal courts.

Canada's Court System



Ontario's Court System



STATUTORY INTERPRETATION

It might be assumed that the uncertainty inherent in judicial development of common law rules will be absent in the case of statutes. If a statute governs a question and the rule is written down once and for all, rather than being developed ad hoc over decades, surely there can be less room for argument; all we have to do is look at the express language of the Act, right?

Wrong; things are not that simple. Written words in a statute will give rise to ambiguity, uncertainty, vagueness, possibly absurd conclusions, etc. The question of what the words of a statute actually mean, and how that statute is meant to be read, gives rise to just as much legal debate as does the common law. Fortunately, however, the Canadian courts have a straightforward principle to guide the interpretation exercise. The modern approach to statutory interpretation in Canada has been endorsed by the Supreme Court of Canada on multiple occasions and applies outside of the criminal law context without reservation. As we will see next week, there is some debate about the appropriate approach to statutory interpretation in the criminal law context.

The 'Modern Principle' of Statutory Interpretation:

"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

Despite the apparent simplicity and clarity of the modern principle, it leaves much to be considered in answering particular interpretative questions.

The theory and methodology of statutory interpretation is a challenging subject, and it is as extensive and complex as the theory and methodology of the common law. Statutory interpretation in Canada is rooted in the common law, in a body of principles, presumptions, and conventions known as the "rules of statutory interpretation." Strictly speaking, these rules are not binding, but rather operate as guidelines. The rules of interpretation offer interpreters a checklist of relevant considerations, suggesting various lines of inquiry and ensuring that no possibility has been overlooked. They are relied on by counsel in developing arguments and by judges to justify outcomes in interpretation disputes. Many of these so-called "rules" will lead to conflicting or contradictory interpretations, highlighting the fact that these are in essence no more than argumentative tools. The following guidelines, at all times, are best regarded as ways of approaching the 'modern principle' of statutory interpretation.

Rules about meanings:

- **Ordinary meaning rule:** Ordinary meaning is the meaning that spontaneously comes to the mind of a competent reader upon reading a legislative text. This is presumed to be the meaning intended by Parliament. However, the presumption can be rebutted by evidence suggesting that some other meaning was intended.
- **Literal rule:** The words in their literal meaning are controlling. This rule assumes a certainty and stability in the meaning of words that does not always exist.
- **Golden rule:** The court must apply the literal meaning of the statute unless it would give rise to an absurdity, in which case the court should reach a conclusion that avoids that absurdity.
- **Mischief rule:** The court should see what evil or deficiency the statute sought to set right, and to interpret it accordingly. This essentially asks the interpreter to look for the purpose of the statute and interpret the words in light of that purpose.
- **Technical meaning rule:** It is presumed that legislatures use words in their popular, non-technical sense. However, when legislation deals with a specialized subject and uses language that people governed by the legislation would understand in a specialized way, that specialized understanding is preferred over ordinary usage.
- **Shared meaning rule:** If there is a discrepancy between the versions of a bilingual statute, the meaning that is shared by both versions is presumed to be the intended meaning.
- **Original meaning rule:** The meaning of the words used by legislative text is fixed at the time of enactment, but its application to facts over time is not fixed.
- **Plausible meaning rule:** If ordinary meaning is rejected to give effect to the actual or presumed intentions of the legislature, the meaning must be one that the text is capable of bearing.

Legislative intent, purpose and scheme analysis

- **Legislative intent:** Courts may look to the intent of Parliament where legislation is ambiguous or does not appear to address a particular issue. Courts look to various sources such as the text of proposed bills, amendments that were proposed, Parliamentary speeches, and other relevant statutes.
- **Legislative purpose:** Interpreters must always try to determine the purpose of the legislation and, in so far as the text permits, adopt an interpretation that promotes or is at least consistent with those purposes. Interpretations that would tend to defeat legislative purpose may be considered absurd.
- **Interpretation Acts:** The *Interpretation Act* of each Canadian jurisdiction includes a provision that directs interpreters to give every enactment “such fair, large and liberal construction and interpretation that promotes the purpose of legislation as best ensures the attainment of its objects.”
- **Legislative scheme:** The provisions of an act are presumed to work together as parts of a coherent scheme designed to implement the legislature’s goals.

Presumptions relied on to analyze the meaning of a text

- **Straightforward expression:** The legislature chooses the clearest, simplest and most direct way of stating its meaning.
- **Uniform expression:** The legislature uses the same words and techniques to express the same meaning and different words and techniques to express different meanings.
- **No tautology/redundancy (the legislature does not legislate in vain):** There are no superfluous words in legislation; every word, every feature of the text is there for a reason and plays a meaningful role in the legislative scheme.
- **Internal coherence:** All the provisions of a legislative text fit together logically and work together coherently to achieve the purposes of the legislation.
- **Implied exclusion (*expressio unius est exclusio alterius*):** If something is not mentioned in circumstances where one would expect it to be mentioned, it is impliedly excluded.
- **Associated words (*noscitur a sociis*):** The meaning of a word or phrase is affected by the other words or phrases with which it is linked in a sentence.
- **Limited class (*eiusdem generis*):** When a list of things that all belong to an identifiable class is followed by a more general term, the general term may be “read down” to include only other things within the identifiable class. (For example, in the phrase “ice skating, sledding, skiing, and other sports,” “sports” may be read down to include only sports that are played in winter.)

Mistakes and gaps in the legislative scheme

- **Corrigible mistakes:** Although the legislature is presumed not to make mistakes, the presumption is rebutted by persuasive evidence that the text does not accurately reflect the rule that legislature intended to enact.
- **Incorrigible gaps:** The courts almost always deny jurisdiction to cure a gap in a legislative scheme or to otherwise cure underinclusive provisions by making them apply to facts outside the ambit of the language of the text. Curing an underinclusive scheme or provision amounts to “reading in,” which is generally considered a form of judicial legislation, as opposed to “reading down,” which is not.
- **Supplementing legislation by reliance on common law (or the *Civil Code*):** Although the courts cannot cure underinclusive legislation by expanding its scope beyond what the text allows, it can rely on supplemental sources of law to complement what the legislative scheme provides. In doing so, it must often address the difficult question of the relationship between statute law and the common law.

Avoiding absurdity

- **Absurd consequences:** It is presumed that the legislature does not intend its legislation to produce absurd consequences. Therefore, an interpretation that avoids such consequences is preferred over one that does not. The following are forms of absurdity that the legislature is presumed to avoid:
 - irrational distinctions;
 - irrational, contradictory, or anomalous effects;
 - defeating the purpose of the legislation;
 - undermining the efficient application of legislation; and
 - violating important norms of justice or fairness

Relation to Other Legislation and Other Sources of Law

- **Constitutional law:** It is presumed that legislatures intend to enact constitutionally valid law and, in particular, to comply with any limitations on their jurisdiction set out in the various Constitution Acts. For this reason, an interpretation that renders legislation valid is preferred over one that does not.
- **Regulations:** Regulations must be read in light of their enabling provision and their enabling legislation as a whole. The regulations and enabling legislation are presumed to constitute an integrated scheme.
- **Related legislation (statutes in pari materia):** Statutes dealing with the same subject matter must be read together and are presumed to offer a coherent and consistent treatment of the subject.
- **The statute book:** Even if statutes do not relate to the same subject, it is often useful to compare provisions in different enactments that deal with a particular matter. Given that drafters are presumed to be consistent in their use of language and techniques, the similarities and differences among the provisions can form the basis for inferring legislative intent. Note that there are exceptions to this general rule. For instance, in the *Criminal Code*, a word's meaning in one provision may differ from the same word's meaning in another provision.
- **Common law:** Provincial legislation (outside Quebec) sometimes incorporates common law concepts or terms; and federal legislation sometimes incorporates common law and civil law concepts or terms. In such cases, resort to the common law (or civil law) sources as appropriate to determine the meaning of the concept or term.
- **International law:** It is presumed that legislatures, provincial as well as federal, intend to comply with international law, both customary and conventional.

Legal Methods Intensive—Glossary

Act: A statute enacted by Parliament or a legislature.

Appeal: Examination by a higher court of a lower court or tribunal decision. The higher court may affirm, vary, or reverse the original decision.

Appellate Court: The court that hears appeals from judgments of the trial courts. There are provincial appellate courts to hear appeals from the provincial courts and the provincial superior courts, and a Federal Court of Appeal to hear appeals from the Federal Court, Trial Division.

Bill: A proposed Act or Statute prior to its enactment.

Branches of Government: There are three branches of government: (1) the Executive, comprising essentially the Cabinet and the Ministries; (2) the Legislative, being Parliament in the federal sphere and the legislatures in the provincial sphere; and (3) the Judicial.

Canadian Charter of Rights and Freedoms: Since 1982, a part of the Constitution of Canada guaranteeing certain specific rights and protections against state action

Civil law: The system of law predominant on the European continent and of which a form is in force in Quebec, historically influenced by the codes of ancient Rome.

Common Law: The law as stated in the decisions of the judges from the earliest times to the present.

Constitution Act, 1867: Originally enacted as The **British North America Act, 1867**, and referred to as the **BNA Act**. The Act created a federal dominion and defines much of the operation of the Government of Canada, including its federal structure, the House of Commons, the Senate, the justice system, and the taxation system.

Constitution Act, 1982: Reaffirmed the constitutionality of the contents of the 1867 acts and incorporated the following new provisions into the Canadian Constitution: an amending procedure, a Charter of Rights and Freedoms, an affirmation of the existing rights of native peoples, an entrenchment of the principle of equalization and a delineation of provincial powers over resources.

Courts/Judiciary: The institution in society that resolves disputes in accordance with the law. Such disputes can arise between citizens or between citizens and their government. Courts are also given the responsibility to ensure that the government has acted in accordance with the Constitution.

Dialogue: The relationship of give and take between courts and legislatures resulting from judicial decisions striking down laws and fresh legislation enacted in response.

Dissent: An explicit disagreement by one or more judges with the decision of the majority on a case before them.

Executive branch: The branch of government, consisting of the queen (as represented by the governor general), the Cabinet, and the ministries of the government, vested with the responsibility of administering and enforcing laws.

Governor General: The personal representative of the Sovereign in Canada and the largely ceremonial Head of State when the Queen of Canada is not in Canada.

Governor in Council: The Governor General acting on the advice of Cabinet.

Her Majesty's Loyal Opposition or "the Opposition": The largest group of non-government members in Parliament or a legislature whose role is to oppose the government.

House of Commons: The lower house of the Canadian Parliament, currently composed of 308 members of parliament, elected in single-member constituencies representing the entire country. The House of Commons is elected based on the principle of a universal adult right to vote. The government in power must enjoy the confidence of the House of Commons in order to remain in office.

International law: A body of rules established by custom or treaty and recognized by nations as binding in their relations with one another.

Judicial branch: The branch of government, consisting of the system of courts and all judges, vested with the responsibility to interpret, construe, and apply the law.

Judicial independence: The constitutional rule that the judiciary is to be insulated from manipulation and the perception of manipulation from the other branches of government.

Judicial Opinions/Judgments/Decisions: The (usually) written reasons given by judges for their conclusions as to a dispute at issue.

Justice System: An unspecific and ill-defined term often used to describe one or all of the various components of the law-related institutions of the state, including courts, lawyers, police, parole, prisons and other corrections facilities.

Legal Positivism: A school of legal theory whose advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies.

Legislation: One or more statutes or Acts enacted by Parliament or a legislature

Legislature: The provincial equivalent of the federal Parliament but with only one House, usually called the Legislative Assembly

Ministry: A branch or department of a government, such as the Ministry of Citizenship and Immigration, Refugees and Citizenship (federal), or the Ministry of Education (provincial).

Obiter Dicta: Statements made by a judge in the course of giving his reasons for a decision in a particular case that are not necessary elements of the reasons for the decision. That is, the judge

could have reached the decision without making the statements. Under the common law, obiter dicta are not binding on courts in subsequent cases.

Parliament: The House of Commons and the Senate of Canada.

Parliamentary Supremacy: The principle that the elected representatives of the people, assembled in Parliament, have unlimited power to make the law, the one exception being that Parliament cannot bind its successors.

Precedent: A court decision (or body of decisions) that is cited as an example or analogy to resolve similar questions of law in later cases.

Ratio Decidendi: The legal principle upon which the decision in a specific case is founded. Also known as the holding of a decision.

Reference: A process by which the government refers a legal or constitutional question, such as the validity of legislation, to a court for the purpose of obtaining a decision of the court on the question referred.

Royal Assent: The last procedural step in the enactment of legislation where the Queen's representative "consents" to the enactment.

Rule of Law: A synonym for law and order; the principle that requires that the powers of the state and its servants shall be derived from and limited either by legislation enacted by Parliament or a legislature, or judicial decisions taken by independent courts. Law by definition is a body of rules of general application. The rule of law is to be contrasted with "rule of man", or "the rule of force" which implies arbitrary, or autocratic governance by an individual or individuals not responsible to the people of the state.

Senate: The appointed (unelected) federal legislative body. Senate approval is required for all ordinary bills and for most constitutional amendments.

Separation of powers: The partition of legal powers between branches of government, most often categorized as the legislature, the executive, and the judiciary.

Stare Decisis: The principle by which decisions of a higher court are binding on and must be followed by lower courts.

Statute: A law or act enacted by a Parliament or Legislature.

Trial: A judicial examination and determination of facts and legal issues arising between parties to a civil or criminal action.

Trier of Fact: The person or people in court who assess the facts of the case, namely, the jury, when it exists, or the judge.

LEGAL METHODS ASSIGNMENT 1

GUIDELINES

YOUR TASK: A one-page case brief of the case *Mattel, Inc v 3894207 Canada Inc*, [2006] 1 SCR 772.

Briefing a case is an important skill. A case brief is a short summary of the different components of a case you read for class. It is a study tool. You will use your case briefs to help you understand and remember the key components of a case. Understanding the key components of cases earlier in law school will help you become a better lawyer.

DEADLINE: A one-page hard copy of the assignment must be submitted to your professor at 10:00 a.m. on Thursday, August 23, 2018.

LENGTH: There is a strict maximum of one page, single-spaced, 12-point Times New Roman with 1" margin.

GRADING: The case brief will be assessed on a credit / no credit basis.

LEGAL METHODS ASSIGNMENT 2

In-Class Writing Exercise: Background materials

THE CABOT COVE OCCUPATIONAL HEALTH AND SAFETY ACT (“OHSA”)

1. Short title

This Act may be cited as the “*Occupational Health and Safety Act*” or “OSHA”.

2. Purpose of Act

The purpose of this Act is to assure, so far as possible, to every working person in the province, safe and healthful working conditions and to preserve human resources.

3. Definitions

Employer – i) any public corporation; ii) any firm, person, corporation, partnership or association; and iii) any office having control over employment duties or over any employee.

Employee – an individual who is employed by an employer.

Place of employment – any place, area, or environment in or about which an employee is required or permitted to work.

Occupational Safety and Health Hazard – any practice or condition in a place of employment that may be deemed detrimental to the safety and health of employees.

Occupational Injury or Illness – any abnormal condition or disorder of an employee caused by exposure to factors associated with their employment.

4. Duties of Employers and Employees

4(1) Each employer has the duty to provide a place of employment that is safe, healthful, and free from recognized occupational safety and health hazards likely to cause death or serious harm.

4(2) Each employee has the duty to comply with reasonable safety requirements imposed by the employer to the extent that such requirements are applicable to the employee’s own actions and conduct.

5. Enforcement by Bureau

The Cabot Cove Occupational Health and Safety Bureau shall issue administrative penalties to any employer who violates any provision of this Act of up to \$10,000 per violation.

6. Private Right of Action

Any employee who suffers an occupational injury or illness as a result of their employer's violation of any provision of this Act may bring a private action in the Cabot Cove Superior Court for compensatory damages. If such violation is wilful or repeated, the employee may recover punitive damages in addition to compensatory damages.

DEEK CONSTRUCTION v. JACK DERRYDA

Cabot Cove Court of Appeal, November 13, 2012

Lansbury J. – writing on behalf of the court

Deek Construction appeals a decision from the Cabot Cove Superior Court. The Superior Court held that Deek violated section 4(1) of the *Occupational Health and Safety Act* (“Act”) and awarded the plaintiff-respondent, Mr. Jack Derryda, compensatory and punitive damages under section 6 of the Act.

Deek Construction is a large general contractor that performs work at 20 to 30 worksites at any given time. For the past two years, Deek has been working on building a jail in Cabot Cove. Within the past year, an OSHA compliance officer noted several violations for which Deek was ordered to pay administrative penalties. All prior violations took place two months to one year before the accident at issue in this case. They all occurred at other projects within the province. Although all of the violations were deemed to be a “health hazard” under the definition in section 3 of the Act, none involved the same conduct. The conduct included: failure to provide adequate scaffolding, failure to guard open manholes, and failure to keep passageways clear of hazardous obstructions.

The incident at the heart of this case took place on Friday, June 13, 2010. Jack Derryda is an employee of Deek. Derryda was seriously injured when a trench he was digging at the jail worksite caved in on him. In a separate action, Deek was charged under section 5 of the Act and given the maximum administrative penalty. In this action, Derryda claims damages as a result of the company’s violation under section 6 of the Act.

Deek concedes that its failure to shore, sheet, brace, slope or otherwise support a trench of a depth greater than 2 metres, which permitted the collapse of the trench and the injury of an employee, constituted a “health hazard” under section 3 of the Act. They challenge the trial judge’s conclusion that the failure was “wilful” or “repeated”.

We disagree with the appellant. The appellant was aware of the shoring requirements applicable for trenches of two or more metres in depth. Further, the appellant had been found to be in violation of the Act on several occasions.

Here, Deek’s manager, Will Power, measured the depth of the trench the evening before the accident. The depth was 1.83 metres from the ground surface to the top of a transit water main just uncovered. Power testified that he “knew that the workers had some distance to go” and the next day instructed Derryda “to dig around and beneath the water main”. Power knew that this depth would exceed 2 metres. Yet, knowing this, and that the workers were already beginning to dig, he left without giving any instructions as to shoring. There had, in the past, been general instructions about shoring at a depth of 2 metres. But Power neither ordered shoring nor returned to the trench until the shouts of his workers alerted to him to the fact that Derryda had been trapped.

Wilfulness implies knowingly acting in disregard of the legality of her or his actions. There is no need to show malicious intent. Indifference to the requirements of the law may qualify as “wilful” under the Act. Power’s subjective determination that there was no danger is not sufficient. Deek, through its manager, made its choice - a conscious, deliberate, intentional decision that is properly described as wilful. We reject the appellant’s argument that wilfulness requires an “obstinate refusal to comply” with the law. This would curb the availability of punitive damages under the Act, a result we do not feel was intended by the legislature.

We now turn to the difficult question of what constitutes “repeated” violations for the purposes of section 6. A common usage of the term connotes only that a single prior violation, regardless of its similarity to the present violation, needs to be proven. A strict interpretation would suggest that violations are repeated even if the same standard is never violated twice, so long as the duty under section 4(1) is repeatedly violated in such a way as to demonstrate a flaunting disregard of the requirements of the Act. Among the factors that the court must consider when determining whether a course of conduct is flaunting the requirements of the Act are the number, proximity in time, nature and extent of violations, and the degree of care of the employer in her or his efforts to prevent violations of the type involved.

Intrinsic within the statutory scheme is the overall policy of providing employers with incentives to comply with the safety requirements of the Act. The system of penalties under section 6 allows for punitive damages when the need arises to provide an employer with added incentive to comply.

After review of the facts here we are satisfied with the finding that there are repeated violations for the purposes of section 6 of the Act. The actions of Deek are one piece of a disturbing jigsaw puzzle of violations and disregard for the safety of employees. Deek violated the Act three times in less than a year and all within the same province.

Appeal dismissed.

ANGIE NEHAR v. CRUMBLE UNIVERSITY

Cabot Cove Court of Appeal, October 1, 2014

Fletcher J. – writing on behalf of the court

Angie Nehar appeals the summary judgment against her entered by the trial court. Angie Nehar sought compensatory and punitive damages under the *Occupational Health and Safety Act* (“Act”). We dismiss the appeal and affirm the summary judgment.

Facts and Background

The events surrounding this litigation arise out of the construction of the Golden Laboratory Building (“the project”) at Crumble University (“Crumble”). Sometime in 2010, Crumble hired General Contractors (“GC”) as the project’s general contractors, who in turn engaged Designing Engineers (“DE”) to be the designing engineers on the project.

Things got off to a bad start. In January 2011, heavy electrical equipment used by GC caused a severe power shortage through the Crumble campus. Consequently, lighting conditions in Crumble classrooms were extremely poor. Crumble refused to take steps to improve the situation, and several professors complained to the Occupational Health and Safety Bureau (“Bureau”). After conducting a thorough investigation, the Bureau issued Crumble with administrative penalties. Between January 2011 and November 2012, Crumble amassed a total of twelve administrative penalties from the Bureau due to lighting problems.

Things were about to get worse. More serious problems emerged in December 2012 when GC began to pour the concrete that would serve as the ceiling for the project’s first level and the floor for the project’s second level. A reinforced temporary ceiling had already been constructed over the first level. On Friday, December 13, 2012, GC’s superintendent, Dixie Dodo, began

pouring the first layer of concrete onto the temporary ceiling. Dodo noticed that a section of the temporary ceiling was beginning to sag.

Dodo immediately attempted to telephone DE to inform them of the problem. His call did not go through as DE's phone had been temporarily disconnected. Dodo then called the President of the University, James Marshall, who in turn called Angie Nehar, one of Crumble's foremost engineering professors, to look into the problem. Nehar was intrigued and accompanied Marshall to the project site. They surveyed the project from a distance. President Marshall said: "I can't see anything. You're going to have to get a lot closer." Nehar obliged, and just as she was about to edge underneath the temporary ceiling, the whole structure collapsed, burying her. Remarkably, she survived. She is, however, paralyzed from the waist down.

Nehar brought an action for compensatory and punitive damages alleging that Crumble violated its duty under section 4(1) of the Act. The trial court granted Crumble's motion for summary judgment. This appeal followed.

Discussion

The dispositive question here is whether the construction site was a "place of employment" which Crumble had a duty under the Act to protect. In light of the plain meaning of section 3 of the Act, we find that Crumble had no such duty. Nehar is an engineering professor who conducted her classes and maintained her office in the Engineering Department at Crumble. There is no indication that she was required, as a condition of her employment, to be on the construction site. Rather, the record shows that she voluntarily accepted President Marshall's invitation to inspect the sagging structure. Under these circumstances, we do not think that the construction site is a "place of employment" which Crumble had a duty under the Act to protect.

We find it prudent to also address certain questions with respect to punitive damages as well, since trial courts have come to different conclusions as to the appropriateness of this remedy. An employee is entitled to punitive damages if she or he is injured as a result of an employer's wilful or repeated violation of the Act (s. 6).

Wilfulness connotes defiance or such reckless disregard of consequences as to be tantamount to a knowing, conscious, and deliberate flaunting of the Act. Wilful means more than merely voluntary action or omission. Unless an employer engages in such deliberate behaviour, it is not liable for punitive damages under the "wilful" prong of section 6.

As for "repeated", we could construe the term to mean that an employer is liable for punitive damages if it merely violates the general duty more than once, no matter how unrelated the infractions. Given the breadth of the general duty, this interpretation would expose nearly every employer liable for punitive damages in every case. It is clear that punitive damages aspect of section 6 is directed at particularly flagrant conduct, such as an employer's failure to cure an identified safety hazard for which it has already been cited. Therefore, we conclude that a violation is "repeated" under section 6 only if the employer has previously been cited as having engaged in the same or substantially similar conduct.

We affirm the judgment of the lower court.

